



OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

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|-------------------------------|---|---------------------|
| In the Matter of |) | PCH-2003-15 |
| |) | |
| OCEANIC COMPANIES, INC., |) | HEARINGS OFFICER'S |
| |) | FINDINGS OF FACT, |
| Petitioner, |) | CONCLUSIONS OF LAW, |
| |) | AND DECISION |
| vs. |) | |
| |) | |
| DEPARTMENT OF TRANSPORTATION, |) | |
| STATE OF HAWAII, |) | |
| |) | |
| Respondent. |) | |

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On May 15, 2003, Oceanic Companies, Inc. ("Petitioner"), filed a request for an administrative hearing to contest the Department of Transportation, State of Hawaii's ("Respondent"), May 12, 2003 denial of Petitioner's protest dated April 24, 2003, in conjunction with an invitation for bids ("IFB") for Interim Federal Inspection Services (FIS) Improvements, Kona International Airport at Keahole; State Project No. DH2301-63 ("Project"). On May 15, 2003, a Notice of Hearing and Pre-Hearing Conference was issued and duly served on the parties.

On May 21, 2003, the hearing in this matter was convened by the undersigned Hearings Officer pursuant to Hawaii Revised Statutes ("HRS") Chapter 103D. Petitioner was represented by its authorized representative, Joel E. Sinn. Respondent was represented by Wayne A. Matsuura, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on May 28, 2003, Petitioner filed its closing brief. On June 4, 2003, Respondent filed its closing brief and on June 9, 2003, Petitioner filed its reply brief.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. In or about April 2003, Respondent issued an IFB, seeking sealed bids for the Project. The Project involved the “removal of carpeting, sealants, and miscellaneous items, and the engineering of a new pre-engineered fabric covered steel frame canopy with reinforced concrete footings, resealing existing fabric structure, carpeting, painting and related work”.

2. The IFB provided in relevant part:

LISTING OF JOINT CONTRACTORS AND/OR SUBCONTRACTORS – The bidder’s attention is directed to the Proposal where the names of all joint contractors and/or subcontractors to be engaged in the work and the nature of work involved must be indicated by completing the form provided in the proposal. Failure to comply may result in the rejection of the bid.

* * * *

3. Prior to the April 24, 2003 deadline, bids were submitted by Respondent and Armand Gonzales, dba Gonzales Construction (“Gonzales Construction”).

4. On April 24, 2003, the designated bid opening date, Respondent opened the sealed bids, tabulated them and determined that the apparent low bid had been submitted by Gonzales Construction in the sum of \$675,673.00. The total sum of Petitioner’s bid was \$769,472.00.

5. In its bid, Gonzales Construction identified CIFR, Ahtna Government Services (“Ahtna”) and Concrete Specialist as three of its subcontractors. The bid described the nature and scope of CIFR’s work as “Tent canvas”, Ahtna’s work as “Site work”, and Concrete Specialist’s work as “Concrete and site work”.

6. Neither CIFR nor Ahtna are licensed to engage in contracting activity in Hawaii.

7. Both Gonzales Construction and Petitioner hold “A” general engineer contractor’s licenses. In addition, Petitioner holds a “B” general building contractor’s license.

8. On April 24, 2003, Petitioner protested the contemplated award of the contract for the Project to Gonzales Construction.

9. By letter dated May 12, 2003, Respondent denied Petitioner's protest. On May 15, 2003, Petitioner filed a request for administrative review of the denial of the protest.

10. The proposed contract for the Project has not been awarded.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

Petitioner alleges that Gonzales Construction's bid is nonresponsive because the subcontractors it listed to perform the recanvassing work and the site work were not properly licensed prior to the submission of the bid¹.

1. CIFR.

Petitioner charges that according to Gonzales Construction's bid, CIFR was listed as the subcontractor engaged to perform the recanvassing work on the Project. Petitioner contends that such work requires a "C-5" specialty contractor's license and because CIFR did not have such a license, the bid is nonresponsive.

Respondent argues that CIFR was only listed as the supplier of the tent material and therefore was not required to be licensed. According to Respondent, no license is required to perform the recanvassing work. Therefore, the work can be performed by Gonzales Construction. In the alternative, if a "C-5" license is required, Respondent asserts that the work may be performed by Concrete Specialist, another subcontractor listed in Gonzales Construction's bid. Concrete Specialist holds a "C-5" license.

¹ Article II, Section 2.1 of the Special Provisions of the IFB requires that "all subcontractors must have the required license before the submission of the bidder's proposal in the case of a non-federal aid project. . ."

Petitioner's claim turns on whether a "C-5" specialty contractor's license is actually required by HRS Chapter 444 and its implementing rules. Thus, at the outset, the Hearings Officer must determine whether a "C-5" specialty contractor's license is required to perform the recanvassing work. Petitioner, however, presented very little, if any, reliable evidence to establish the existence of such a requirement². As the party initiating this action, Petitioner has the burden of proof. HRS §103D-709(c). Based upon the evidence in this case, the Hearings Officer cannot conclude that (1) a "C-5" specialty contractor's license is required to perform the recanvassing work and that as such, (2) Gonzales Construction's bid is nonresponsive because the subcontractor it listed to perform the work did not have such a license.³

2. AHTNA.

Petitioner also asserts that although Gonzales Construction's bid described the nature and scope of Ahtna's work as "site work", the subcontractor is not licensed to perform any of the site work called for in the Project. In addition, Petitioner points out that another subcontractor, Concrete Specialist, was also listed in Gonzales Construction's bid to perform "Concrete and *site work*" (emphasis added).

Respondent, on the other hand, explains that the work Ahtna was originally subcontracted to perform was limited to providing moving services for which no contractor's license is required. According to Respondent, the site work called for in the Project for which a contractor's license is required will be performed by Concrete Specialist, a listed subcontractor who holds the required licenses.

HRS §103D-302(b)⁴ requires that bidders, among other things, disclose the nature and scope of the work to be performed by its listed subcontractors. In *Frank Coluccio Construction*

² On May 28, 2003, Petitioner submitted, among other things, an informal opinion from the Executive Officer of the Contractors License Board regarding the requirement for a "C-5" license. That letter, however, was not made a part of the record prior to the conclusion of the hearing on May 21, 2003 and is therefore not properly before the Hearings Officer. Moreover, and in any event, the letter constitutes inadmissible hearsay.

³ On the other hand, if a "C-5" specialty license is required to perform the work involved here, Respondent may not rely on Concrete Specialist if the work does not fall within the "nature and scope" of its work. See *Frank Coluccio Construction Company, et al. v. City & County of Honolulu, PCH-2002-7 (August 2, 2002)* (bidders are required to disclose in its bid the work to be performed by each subcontractor and use the listed subcontractor to perform only the work previously disclosed in the bid).

⁴ HRS §103D-302(b) states:

An invitation for bids shall be issued and shall include a purchase description and all contractual terms and conditions applicable to the procurement. *If the invitation for bids is for construction, it shall specify that all bids include the*

Company, et al. v. City & County of Honolulu, PCH-2002-7 (August 2, 2002), the Hearings Officer noted that this disclosure was necessary to prevent a bidder from listing more than one subcontractor for the same work, then following the award of the contract, bid shop among those listed. With this consideration in mind, the Hearings Officer reasoned that by requiring the bidder to (1) disclose in its bid the work to be performed by each subcontractor, and (2) use the listed subcontractor to perform only the work previously disclosed in the bid, this problem is avoided. Thus, according to the Hearings Officer, “the failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor *may* render a bid nonresponsive regardless of whether there is evidence of bid shopping.” This is so because the Legislature, rather than rely on after-the-fact inquiries into bid shopping, sought to establish a process that would reduce the *opportunity* to bid shop. *Frank Coluccio Construction Company, PCH-2002-7*. Consequently, a violation of HRS §103D-302(b) occurs where a bidder fails to properly and adequately describe the nature and scope of its subcontractors’ work which, in turn, creates an opportunity to bid shop.

In this case, even though Gonzales Construction’s bid listed two subcontractors to perform “site work” on the Project, there is no dispute that only one, Concrete Specialist, was properly licensed to perform that work.⁵ As such, the opportunity to bid shop between the two subcontractors by the bidder would appear to be both tenuous and remote.⁶ On this record, the Hearings Officer cannot conclude that Gonzales Construction’s bid violated HRS §103D-302(b).

name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if the chief procurement officer or rules of the policy office conclude that acceptance is in the best interest of the public and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.

(Emphasis added).

⁵ It is also worth noting that the requirement set forth in HRS §103D-302(b) to list all subcontractors “to be engaged by the bidder” is not limited to those subcontractors whose work requires a contractor’s license. “Subcontractor” is defined as “any person who enters into an agreement with the contractor to perform a portion of the work for the contractor. *Hawaii Administrative Rules §3-120-2*.

⁶ The intent of the Code, as expressed in the Senate Committee’s Report S8-93, Spec. Sess., Senate Journal at page 39 (1993), states that “This bill lays the foundation and sets the standards for the way government purchases will be made, but allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State.” *The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998)*.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this matter be and is hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: _____

JUL -3 2003



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs